Filed 7/5/22 In re D.M. CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

In re D.M. et al., Persons Coming Under the Juvenile Court Law.	B315032 (Los Angeles County Super. Ct. No. 18CCJP05993A-B)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. VANESSA M., Defendant and Appellant.	

APPEAL from orders of the Superior Court of Los Angeles County. Philip L. Soto, Judge. Affirmed.

Carolyn S. Hurley, under appointment by the Court of Appeal, for Defendant and Appellant.

Dawyn R. Harrison, Acting County Counsel, Kim Nemoy, Assistant County Counsel, and William D. Thetford, Principal Deputy County Counsel, for Plaintiff and Respondent.

Vanessa M. (mother) appeals from the termination of her parental rights over her daughters D.M. (born June 2012) and Denise M. (Denise, born Feb. 2014), as well as the denial of her motion to modify the order terminating reunification services. Mother contends that the juvenile court and the Los Angeles County Department of Children and Family Services (DCFS) failed to adequately comply with its duty of inquiry under the Indian Child Welfare Act of 1978 (ICWA) (25 U.S.C. § 1901 et seq.).

Although DCFS concedes that it erred by failing to ask maternal family members about the children's potential Indian status, we conclude that the error was harmless. Therefore, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND[1]

On September 14, 2018, DCFS received a referral from the Los Angeles Police Department. The previous day, then six-year-old D.M. was reported missing after mother's cousin, Victoria E. (Victoria), had picked her up from school. Mother admitted that she had asked Victoria to retrieve D.M., even though mother

---

[1] Because ICWA error is the only issue raised in this appeal, this summary focuses on the facts related to ICWA compliance.

knew that Victoria habitually used methamphetamines. After Victoria failed to bring D.M. home, neither mother nor the children's maternal grandmother, Barbara G. (grandmother), could contact her. D.M. was found alone in a park the next day. When attempting to pick D.M. up from the police station, mother failed a field sobriety test and reluctantly admitted that she had recently used methamphetamine. She was promptly arrested for child endangerment and narcotic use, and D.M. and Denise were placed into foster care.

On September 18, 2018, DCFS filed a petition seeking the juvenile court's exercise of dependency jurisdiction over the children, due to risks posed by mother's substance abuse and her relationship with an abusive boyfriend.

Mother told DCFS that she "d[id] not have any knowledge of having ties to any Native American tribes," and that she could not provide information on whether the children's potential father(s) had "any ties to Native American Indian heritage." She later confirmed this on a Parental Notification of Indian Status (ICWA-020) form, stating that she had "no Indian ancestry as far as I know."

On September 19, 2018, mother and grandmother attended the detention hearing. When asked about the children's paternity, mother agreed that her boyfriend was probably D.M.'s father, but she was unsure about whether he had fathered Denise. She eventually offered two other names as potential fathers: Carlos G. (Carlos) and Brian, last name unknown.

When the juvenile court asked if mother "ha[d] any reason to believe that Carlos or Brian had American Indian heritage," she indicated that she did not. Mother could not provide any additional information about either man.

At the end of this colloquy, the juvenile court concluded that this was "[n]ot an ICWA case for either of the children. Mother has got no American Indian heritage."

Paternity testing revealed that mother's boyfriend was not the biological father of either child. After due diligence searches, DCFS reported that it could not locate either of Denise's alleged fathers. Accordingly, ICWA inquiries could not be made of any paternal relatives.

On August 24, 2020, the juvenile court terminated mother's reunification services. On July 30, 2021, mother filed two petitions pursuant to Welfare and Institutions Code section 388[2] requesting that the court reverse its decision as to each child.

On September 7, 2021, after an evidentiary hearing, the juvenile court denied mother's motion and terminated her parental rights. It determined that the foster parents who had cared for the children for the last three years would become their prospective adoptive parents.

Mother timely appealed.

DISCUSSION

I. *Relevant law and standard of review*

"[The] ICWA reflects a congressional determination to protect Indian children and to promote the stability and security of Indian tribes and families by establishing minimum federal standards that a state court, except in emergencies, must follow before removing an Indian child from his or her family." (*In re Austin J.* (2020) 47 Cal.App.5th 870, 881–882; see also 25 U.S.C. § 1902.)

---

2 All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

Under California law, DCFS and the juvenile court "have an affirmative and continuing duty to inquire" into whether a dependent child "is or may be an Indian child."[3] (§ 224.2, subd. (a); see also *In re Benjamin M.* (2021) 70 Cal.App.5th 735, 741–742.) This duty includes DCFS asking the parents and extended family members whether the child is or may be an Indian child (§ 224.2, subd. (b); see also Cal. Rules of Court, rule 5.481(a)(1)), and the juvenile court inquiring at each party's first appearance in the proceedings whether he or she knows or has reason to know that the child is an Indian child (§ 224.2, subd. (c); see also Cal. Rules of Court, rule 5.481(a)(2)).[4] Further inquiry and notice to the tribes may be required only if there is "reason to believe" or "reason to know" that the child is an Indian child based upon this initial inquiry. (§ 224.2, subds. (d), (e), & (f); 25 C.F.R. § 23.107(c) (2019).)

Numerous appellate courts have recently weighed in on the consequence of a social services agency's failure to conduct the required ICWA inquiry, resulting in "a continuum of tests for

---

[3] For purposes of ICWA, an "Indian child" is an unmarried individual under age 18 who is either (1) a member of a federally recognized Indian tribe or (2) eligible for membership in a federally recognized tribe and is the biological child of a member of a federally recognized tribe. (See 25 U.S.C. § 1903(4) [definition of "'Indian child'"] & (8) [definition of "'Indian tribe'"]; see also § 224.1, subd. (a) [adopting federal definitions].)

[4] The parties agree that the law in effect in September 2021, when the termination hearing was held, applies to these appeals. (See *In re A.M.* (2020) 47 Cal.App.5th 303, 321 ["[s]ince [m]other is appealing from the findings made at the September 6, 2019 section 366.26 hearing and not those in 2017 or 2018, the current ICWA statutes apply"].)

prejudice stemming from error in following California statutes implementing ICWA." (*In re A.C.* (2022) 75 Cal.App.5th 1009, 1011; see also *In re Dezi C.* (June 14, 2022, B317935) ___ Cal.App.5th ___ [2022 Cal.App.Lexis 514, at pp. *7–*9].)

Our Division has adopted the following rule: "[A]n agency's failure to conduct a proper initial inquiry into a dependent child's American Indian heritage is harmless unless the record contains information suggesting a reason to believe that the child may be an 'Indian child' within the meaning of ICWA, such that the absence of further inquiry was prejudicial to the juvenile court's ICWA finding. For this purpose, the 'record' includes both the record of proceedings in the juvenile court and any proffer the appealing parent makes on appeal." (*In re Dezi C.*, *supra*, ___ Cal.App.5th at p. ___ [2022 Cal.App.Lexis 514, at p. *10].)

"We review claims of inadequate inquiry into a child's Indian ancestry for substantial evidence. [Citation.]" (*In re H.V.* (2022) 75 Cal.App.5th 433, 438.) Where the facts are undisputed, we must independently determine whether ICWA's requirements have been satisfied. (*In re D.S.* (2020) 46 Cal.App.5th 1041, 1051.)

II. *Analysis*

DCFS concedes that it erred by not asking grandmother whether she had any information about the children's Indian status. However, it contends that the error was harmless because mother has not demonstrated that grandmother had any meaningful information that could have resulted in a different ICWA finding. We agree.

Based upon mother's statements and representations to the juvenile court early in these proceedings, the juvenile court had sufficient evidence to find that the ICWA does not apply to D.M. and Denise. In the nearly four years that this case has proceeded

through the juvenile and appellate courts, mother has not produced any additional information suggesting a reason to believe that the children could be Indian children within the meaning of ICWA.

On appeal, mother identifies only one available maternal relative, grandmother, with whom DCFS failed to make inquiries.[5] She argues that we should *presume* that grandmother would have "been able to give . . . readily available and meaningful conclusions about whether there was a reason to believe the children were Indian."

However, recent changes to ICWA law have greatly limited the scope of information relevant to determining whether there is reason to know that a child is an Indian child. Under these changes, reason to know that a child is an Indian child arises only in certain enumerated circumstances, including, as relevant here, when "[a] person having an interest in the child, including the child . . . a member of the child's extended family[,] informs

---

[5] Mother also argues that the juvenile court should have inquired with the children's maternal aunt, who she alleges was available for inquiry at the detention hearing, and mother's cousin, Victoria. However, the aunt present at the detention hearing was an alleged *paternal* aunt (the sister of mother's then-boyfriend) who was later found to be biologically unrelated to the children. Nothing in the record suggests that mother referred DCFS to any other maternal aunt.

Mother also never referred DCFS to Victoria, who was not present at any juvenile court hearing or DCFS interview. And Victoria was notoriously unreliable, as she "had no . . . means of contact other than through Facebook messenger when she had wireless internet service." It is therefore extremely unlikely that DCFS could have reached Victoria for comment, even if mother had provided her contact information.

the court that the child is an Indian child." (§ 224.2, subd. (d)(1).) And, under ICWA, a child can only be an Indian child if either the child or her parent is a current member of a federally recognized Indian tribe. We doubt that grandmother, if asked, could have provided any new information about whether the children or mother were current tribal members. (*In re A.C.*, *supra*, 75 Cal.App.5th at p. 1024 (dis. opn. of Crandall, J.) ["Because such basic information is often known or easily discoverable by each respective parent, there is limited utility in remanding such matters for 'extended family member' inquiry"].)

Additionally, it is unlikely that grandmother would have any additional relevant information about the children's Indian status where, as here, mother had a close relationship with grandmother and lived with her for the majority of these proceedings. (See *In re Darian R.*, *supra*, 75 Cal.App.5th at p. 581 [finding that ICWA inquiry was harmless where "mother at various times lived with the relatives she claims DCFS failed to interview"].)

Mother also encourages us to follow a series of opinions holding that prejudice necessarily follows from DCFS's failure to conduct a proper ICWA inquiry, since these procedural errors prejudice a tribe's ability to be notified of a child and to intervene on their behalf. However, the opinions she cites for this proposition all examine errors made *after* a juvenile court has been given reason to believe or reason to know that a child is an Indian child, which triggers duties of further inquiry and notification to any identified tribes. (See, e.g., *In re S.R.* (2021) 64 Cal.App.5th 303, 314–315; *In re Samuel P.* (2002) 99 Cal.App.4th 1259.) We decline to apply the reasoning in these opinions to errors made before this initial requirement is met,

especially when the appealing parent has not indicated that there is any reason to believe that a child is an Indian child within the meaning of ICWA. (*California Building Industry Assn. v. State Water Resources Control Bd.* (2018) 4 Cal.5th 1032, 1043 ["It is axiomatic that cases are not authority for propositions that are not considered"].)

DISPOSITION

The juvenile court's orders are affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
LUI

_____, J.
HOFFSTADT